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No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF FEDERAL TIMBER PURCHASERS COMMITTEE, THE AMERICAN FOREST RESOURCES COUNCIL, CALIFORNIA FORESTRY ASSOCIATION, INTERMOUNTAIN FORESTRY ASSOCIATION, MINNESOTA FOREST INDUSTRIES ASSOCIATION, AND BLACK HILLS FOREST RESOURCES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The timber trade associations participating as *amici*, as discussed below, represent virtually every company in the United States that regularly bids on United States Forest Service timber sale contracts and are therefore uniquely qualified to discuss the implications of the Court of Appeals for the Federal Circuit's ruling in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817 (Fed. Cir. 2010). Amici believe that their brief will assist the Court in fully understanding the issues in this case, and will assist the Court in appreciating the consequences that will likely flow from the application of the Federal Circuit's decision, both to timber purchasers and even to the wider community contracting with the Government. *Amici's* interest in this case arises from a concern regarding the Federal Circuit's ruling, which sets a new, heightened standard for proving breach of the implied duty of good faith and fair dealing.

The Federal Timber Purchasers Committee ("FTPC") is a national organization composed of companies that regularly bid on Forest Service timber sale contracts and regional associations to which many of these companies also belong. Founded 50 years ago

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[1] The parties have consented to the filing of this brief. Counsel for all parties have been given 10-days' notice of the intention of the *amici curiae* to file their brief as required by Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

at the behest of the Secretary of Agriculture, FTPC is the principal liaison between the companies that bid on and perform timber sale contracts and the Forest Service on contract-related matters.

The American Forest Resources Council ("AFRC") is an association that represents nearly 80 forest product manufacturers and forest land owners – from small, family-owned companies to large multi-national corporations – in twelve Western states. AFRC's member companies regularly bid on and perform Forest Service timber sale contracts.

The California Forestry Association ("CFA") is a Sacramento, California-based forest industry advocate. CFA's diverse membership includes biomass energy producers, environmental consultants, financial institutions, forestland owners, forest products producers, loggers, registered professional foresters, wholesalers, retailers, and wood products manufacturers. Many of CFA's members regularly bid on and perform Forest Service timber sale contracts.

Intermountain Forestry Association ("IFA") is an Idaho-based forest industry advocate that was established in 1973. IFA represents companies throughout the Intermountain West, including Colorado, Wyoming and Idaho. IFA's member companies regularly bid on and perform Forest Service timber sale contracts.

Minnesota Forest Industries Association ("MFIA") is an association representing eight forest industry members located primarily in Minnesota. Many of MFIA's members regularly bid on and perform Forest

Service timber sale contracts. MFIA is based in Duluth, Minnesota.

Black Hills Forest Resource Association ("BHFRA") is a non-profit trade association of forest products manufacturers, forestry and timber harvest professionals, and citizens. Headquartered in Rapid City, South Dakota, the trade association focuses primarily on forest management policies pertaining to the Black Hills National Forest in South Dakota and Wyoming. BHFRA's members regularly bid on and perform Forest Service timber sale contracts.

SUMMARY OF THE ARGUMENT

There is a delicate legal relationship between the Government and the firms that purchase timber from federal forestlands, mainly the National Forests managed by the Forest Service. This Federal Circuit decision upsets this relationship, and throws the law of government contracts into a state of uncertainty.

Prior to this decision, timber contractors could expect that the Forest Service might interrupt their ability to harvest the timber while the Forest Service took steps necessary to comply with its environmental obligations arising after contract award. However, contractors could also expect that in the event that the Forest Service itself did not act reasonably and caused timber harvests to be interrupted because, prior to award, it had failed to meet its environmental obligations and/or caused the interruption through its own wrongful conduct in complying with those obligations, the law would see this as a breach of the contract and therefore the Forest Service would be liable for the resulting losses. Such conduct breaches

the Forest Service's implied duty to cooperate and not do anything to hinder the other party's performance of the contract, which is an aspect of the duty of good faith and fair dealing and is inherent in every contract.

The Federal Circuit decision robs the timber contractors of the expectation of commercially reasonable conduct by its contracting partner. This decision, which has stunned both the timber industry and the government contract bar, frees the Forest Service of any liability for breach of its implied duties, even where the agency caused a suspension by wrongfully failing to meet its statutory duties and/or by unreasonably prolonging a suspension. In these circumstances, the Federal Circuit held for the first time that to establish a breach of contract, the contractor would have to show that the Forest Service's misconduct was "specifically targeted" at depriving the contractor of a benefit under the contract. Proof of such intentional conduct would be a rare occurrence. The Federal Circuit's decision eliminated a key protection for timber contractors from objectively unreasonable government conduct that binding Federal Circuit case law has consistently honored in numerous cases, especially in *Scott Timber Co. v. United States*, 333 F.3d 1358, 1368-70 (Fed. Cir. 2003), a timber contract case with quite similar facts.

This decision totally disregards both fundamental fairness and the realities of timber sale contracting. If allowed to stand, it will have the unintended result of decreasing Government revenues and increasing the Government's cost of managing National Forests.

Moreover, the Federal Circuit announced this new, heightened standard for holding the Government liable

sua sponte, as neither the Petitioner nor the Government even discussed such a standard in its briefing or argument to the Federal Circuit. Because review of government contracts decisions is lodged almost exclusively with the Federal Circuit, it is virtually certain that this extraordinary decision will not come before this Court as a case in conflict with a different Circuit.

Additionally, when the Federal Circuit announced its new standard, it did not remand the case to a lower court for development of a factual record under the never-before-applied new standard. The Federal Circuit decision is fundamentally unsound and deserves to be reviewed by this Court.

ARGUMENT

I. The Federal Circuit's Ruling Will Likely Have the Unintended Consequence Of Decreasing National Forest Revenue from Timber Sales and Significantly Increasing The Government's Cost Of Managing The National Forests

Congress established the Forest Service in 1905 to manage the National Forests and provide quality water and timber for the Nation's benefit.[2] At present, there are 155 National Forests comprising some 193 million acres, which is an area the size of Texas. Id. Over the years, Congress has further directed the Forest Service to manage National Forests for

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[2] *See*, http://www.fs.fed.us/aboutus/meetfs.shtml (last visited October 6, 2010).

multiple uses such as water, range, wildlife, timber, and recreation. Id. Multiple use means managing resources under the best combination of all of these uses to benefit the American people. *Id.*

One of the principal tools used by the Forest Service to promote and protect all of these uses is the harvesting of timber which, among other things, thins the forests and thereby reduces the risk of insect infestation, which can arise in dense stands of trees, and catastrophic wildfires that are fueled by overcrowding. *See generally* Government Accountability Office (GAO), "Update on Merchantable Timber Contracting Pilot Program," GAO-09-23, at 12 (March 4, 2010). This work is generally accomplished by the Forest Service's awarding competitively bid timber sale contracts that require the contractor to remove designated trees within a set time period (typically three years) pursuant to detailed specifications. However, rather than being paid by the Government for these services, under a timber sale contract the contractor pays the Government for the timber harvested, plus an amount to fund replanting. Because the vast majority of bidders on federal timber sale contracts are sawmill owners, timber harvested pursuant to such contracts constitutes a valuable source of raw material to supply the bidder's mill where it is manufactured into various lumber products such as 2 x 4's, 2 x 6's, etc.[3] Indeed, in many localities, Forest Service timber sales make up a very substantial

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[3] Those bidders that do not own sawmills are generally loggers who sell the timber harvested pursuant to their timber sale contract to the local sawmill.

part of the available timber supply because a large percentage of the land base is federally owned.

As the Forest Service recognizes, the continued existence of sawmills in proximity to the National Forests is very important to the Forest Service's ability to continue managing the forests at a reasonable cost. *See*, *e.g.*, 74 Fed. Reg. 40,736, 40,739 (Aug. 13, 2009) (Forest Service indicated that actions were needed to prevent the loss of timber industry infrastructure because, without it, management of the National Forests would have to be accomplished with service contracts pursuant to which the Forest Service pays the contractor for removing trees).

The Federal Circuit's decision allows the Forest Service almost total immunity from liability for interfering with its own ability to perform due to its own willful failures to comply with environmental laws. The ruling also shifts the financial consequences of unreasonable agency conduct such as this to timber sale contractors that in the main cannot shoulder those consequences.[4]

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[4] As the government contract bar has already warned, the Federal Circuit's decision appears likely to have a similarly adverse effect on other government contractors. *See*, *e.g.*, Ralph C. Nash, "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 Nash & Cibinic Report, No. 2 (May 2010). (The Federal Circuit "has articulated a standard in ruling on a timber sales contract which flies in the face of almost all prior decisions. The troublesome language in the decision bodes ill for Government contractors.") (citation omitted). *Accord*, Daniel P. Graham et al., "Feature Comment: Fed. Cir. Resets Standard For Breach of the Duty to Cooperate and Not to Hinder," 52 GOVERNMENT CONTRACTOR ¶ 97 (Mar. 18, 2010). (The Federal Circuit's ruling

Allowing the Forest Service to act unreasonably, prevent its own ability to perform its contractual obligations for an indefinite period, and then avoid liability for the resulting damages is also contrary to a timber contractor's reasonable expectation. Each bidder for a Forest Service timber sale contract anticipates that if awarded the contract, with limited exceptions, he will be able to harvest the timber under contract in the time frame provided and that if the Forest Service unreasonably prevents him from doing so, then it will be liable for the resulting damages.[5] Indeed, part of every bidder's reasonable expectation is that the Forest Service has done what it said it would do, *i.e.*, "take[n] every precaution before authorizing a particular activity on National Forest System lands to ensure that its authorization conforms with existing laws and with existing conditions on the ground at the time of the authorization." 69 Fed. Reg. 37,243 (June 28, 2004); 55 Fed. Reg. 35,683, 35,685 (Aug. 31, 1990). By refusing to consult when the Mexican spotted owl was listed, as required by the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, the Forest Service certainly did not "ensure that its authorization conform[ed] with existing laws" for

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"will likely excuse a variety of objectively unreasonable conduct. . . .").

[5] The Federal Circuit nevertheless reasoned that the Forest Service's actions did not deprive Precision Pine of any benefit contained in its contract because Precision Pine had no reasonable expectation of uninterrupted performance. *Precision Pine,* at 596 F.3d 831. Given the existence of standard clauses such as suspension of work, the same incorrect reasoning could apply to most government contracts. Nash, *supra*, note 4.

the 10 sales awarded to Precision Pine after the listing.

As the trial court recognized, a prolonged suspension of a timber sale contract can result in the contractor's loss of substantial profits from the sale of the lumber manufactured from the timber on the suspended contract, *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 484 (2006), *i.e.*, profits that cannot be recouped even when the timber is harvested after the suspension is lifted. *Id.* at 487-88. Given the huge investment in plant and equipment that a mill owner makes, the vagaries of the market for lumber products produced from the timber it harvests and the current economic downturn (particularly in housing construction) which has lumber product prices near historic lows, few companies can survive a lengthy, uncompensated Forest Service suspension that disrupts the flow of raw material to their mill.

The possibility of not being compensated for suspensions caused by the Forest Service and the resulting recognition (given the Federal Circuit 's ruling) of the illusory nature of the Forest Service's contractual obligations will undoubtedly cause some companies to stop bidding on Forest Service timber contracts – something that will hurt the taxpayers in two ways. First, as the Forest Service knows, a reduction in the number of bidders on Forest Service timber sales will likely result in decreased (or even no) competition and bid prices that are less favorable to the Government. *See generally* 74 Fed. Reg. at 40,739 (due to reduced competition, federal revenue from

timber sales will decline).[6] Moreover, as discussed above, a decrease in the number of viable timber sale contractors will require the Forest Service to pay contractors to remove timber in some situations where the Government is presently receiving these services as well as cash payments from its existing contractors.

II. Through Deliberate and Unreasonable Actions That Made Its Own Performance Impracticable, the Forest Service Did Double-Cross Precision Pine

Although the Federal Circuit failed to recognize it, by its failures to comply with the law, the Forest Service did double-cross Precision Pine. That is, prior to award, the Forest Service knowingly failed to do what was required of it by the ESA as a precondition to its performance of the contracts, and then, after award, suspended performance to comply with the very obligation that it refused to perform prior to award. Contrary to the decision of the Federal Circuit, the case law is clear that, where an agency's deliberate and unreasonable actions make its own performance impracticable, it should not be excused from breach liability. *See, e.g., Chalender v. United States*, 119 F. Supp. 186, 190 (Ct. Cl. 1954) (even in the absence of a specific warranty, an unreasonable delay attributable to the Government is a breach of the obligation not to hinder the performance of the other party); *O'Neill v. United States*, 231 Ct. Cl. 823, 825-26 (1982). *See also*

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[6] Even companies that continue to bid on Forest Service timber sale contracts will have to reflect the new risk that the Federal Circuit's decision thrusts upon them by bidding less for Forest Service timber. Nash, *supra*, note 4.

RESTATEMENT (SECOND) OF CONTRACTS § 264, Prevention by Governmental Regulation or Order, cmt. b ("a party who seeks to justify his non-performance under this Section must have observed the duty of good faith and fair dealing imposed by § 205 in attempting, where appropriate, to avoid its application").[7]

Notwithstanding the public purpose of protecting listed species that underlies the ESA consultation process, here, for years the Forest Service deliberately refused to take actions to further that purpose. "[L]ike any other contracting entity, the United States must suffer the consequences of poor, albeit informed choices." *Temple-Inland, Inc. v. United States*, 59 Fed. Cl. 550, 560 (2004) (footnote omitted). *See also*, *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1359 (2009). As noted, the Forest Service, knowing that the ESA required it to consult, not only refused to do so but continued to award timber sale contracts as usual.[8] *Precision Pine & Timber, Inc. v.*

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[7] The above notwithstanding, the Federal Circuit excused the Forest Service from liability for its unreasonable actions by crafting a hitherto unknown "mini-sovereign acts doctrine," the future application of which is uncertain at best. Nash, *supra*, note 4. Moreover, in doing so, the Federal Circuit ignored the requirements for applying the sovereign acts doctrine set forth in *United States v. Winstar Corp.*, 518 U.S. 839, 891-92 (1996). It also ignored the general rule that "where the contracting agency breaches an implied obligation, generally the [sovereign acts] doctrine will not afford protection." Ronald G. Morgan, IDENTIFYING PROTECTED GOVERNMENT ACTS UNDER THE SOVEREIGN ACTS, 22 Pub. Cont. L.J. 223, 258 n.173 (1993).

[8] Moreover, despite knowing that performance of every one of its timber sale contracts was suspended until consultation was

United States, 50 Fed. Cl. 35, 50 (2001). By allowing the contracting agency almost total immunity from liability for causing its own inability to perform even were that inability is rooted in the agency's willful failure to comply with its duties under environmental laws, the Federal Circuit's decision removes a substantial check on agency non-compliance with its statutory environmental obligations.[9] Removing this disincentive certainly does nothing to benefit listed species or the environment, nor will it give agencies any reason in the future to avoid extreme recalcitrance of the sort exhibited by the Forest Service here. Rather, conduct that constituted a willful violation of the environmental laws and required a federal court to compel agency compliance has now been exonerated by the Federal Circuit. It is difficult to perceive any common sense reason why the Forest Service's wholly unreasonable conduct should exempt the agency from breach liability in these circumstances. *See*, Ralph C. Nash, Jr., The Government Contracts Decisions of the Federal Circuit, 78 Geo. Wash. L. Rev. 586, 614 (April,

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completed, something for which the ESA provided only a 135-day time frame, 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(e) (1995), the Forest Service hardly chose to move with all deliberate speed to complete consultation. In this sense, the Forest Service also double-crossed Precision Pine by not completing consultation within the time the law required and as Precision Pine and, indeed, any timber contractor would have reasonably expected.

[9] In so finding, the Federal Circuit relied on its own ruling issued just two days earlier in *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010). Notably, plaintiffs in *Agredano* have also filed a petition for a writ of certiorari in this Court. Although the Government waived its right to file a response this Court has now requested that it do so. *See*, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-99.htm (last visited Oct. 6, 2010).

2010)("[I]t seems clear that the Federal Circuit looks at its role differently than did [its predecessor] the Court of Claims. It appears that the court does not seek to show the citizenry that the Government deals fairly with it. If this is so, we are all losers."

III. Because the Federal Circuit in *Precision Pine* Adopted a New Heightened Standard for the Petitioner's Case But Did Not Remand the Case to a Lower Court for New Factual Findings, Justice Requires a Grant of Certiorari as the Only Avenue Open to the Petitioner and the *Amici*.

The decision of the Federal Circuit in *Precision Pine* presents a compelling situation for this Court to grant certiorari. As the Petitioner has noted,[10] appeals from government contract decisions are heard by the Court of Federal Claims and the Boards of Contract Appeals, and all appeals then go solely to the Federal Circuit. *Precision Pine* does not present a conflict between Circuits, because the Federal Circuit alone hears government contract appeals. Rather, there is a profound conflict within the Federal Circuit, between *Scott Timber*, which protected the reasonable expectations of government contractors, and *Precision Pine,* which does not. This Court is the only tribunal where the Petitioner, and the timber sale contractors represented by *amici*, can seek to have this extraordinary Federal Circuit decision reviewed.

The *Precision Pine* ruling is no typical Federal Circuit contract case. As noted earlier, it has been

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[10] Petition for Writ of Certiorari, Statement of the Case, 2, n.1.

greeted with puzzlement and roundly criticized by the government contract bar.[11] It calls out for review before it becomes settled law and disrupts the status quo for government contracts not only in the Forest Service but in other government agencies as well. In Professor Nash's words, "The troublesome language in the decision bodes ill for Government contractors."[12]

A second compelling reason for this Court to grant certiorari is that the Federal Circuit took an unconventional procedural approach. After introducing this totally new standard at the Circuit level, the Federal Circuit did not remand the case to the trial court for further proceedings under the new standard. The Federal Circuit in prior cases has made it clear that a remand would be necessary here. *Walther v. Secretary of Health and Human Services*, 485 F.3d 1146, 1152 (Fed.Cir. 2007).

Thus, because the Federal Circuit did not remand the case to a lower court, Petitioner and *amici* have no place to turn but to this Court.

Finally, this Court should consider the unusual circumstances surrounding the adoption of this new standard by the Federal Circuit panel. The reason this new standard came as a surprise to the parties was that neither the Government nor Precision Pine had suggested the new standard in its briefing or argument. This was noted in the analysis of the decision in the journal Government Contractor:

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[11] Note 4, *supra*.

[12] Nash, *supra*, note 4.

> Rather, both parties discussed at length *Scott Timber Co.*, which expressly applied the traditional reasonableness standard to the very contractual provision at issue in *Precision Pine*. The Government's argument on appeal was that the COFC failed to apply the evidentiary presumption of good faith and fair dealing. The Government appeared to acknowledge that the ultimate standard was reasonableness. The panel, however, did not reverse the COFC [Court of Federal Claims] based on the failure to apply an evidentiary presumption, but instead articulated a new standard with respect to the ultimate question of breach, without addressing *Scott Timber*'s earlier treatment of the same issue.[13]

These are all factors that, taken together, mark this case as unique. For justice to occur under these special circumstances, it is appropriate and necessary for this Court to grant a writ of certiorari.

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[13] Graham, et al., *supra* note 4.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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